STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of DORIS RUTH MILES, Deceased.

GILBERT J. MILES, STEPHANIE MILES, and EVAN MILES, Co-Personal Representatives of the Estate of DORIS RUTH MILES,

Plaintiffs-Appellees,

v

SOLEUS HEALTHCARE SERVICES OF MICHIGAN, INC., ABC MEDICAL SUPPLY, INC., PROFESSIONAL BREATHING ASSOCIATES, INC., and IRB MEDICAL SUPPLY COMPANY,

Defendants,

and

STAFF BUILDERS HOME HEALTH CARE, INC.,

Defendant-Appellant.

UNPUBLISHED
March 27, 2007

No. 270033
Lapeer Circuit Court
LC No. 03-032528-NO

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant Staff Builders Home Health Care, Inc. (Staff Builders) appeals by leave granted the trial court order denying its motion for summary disposition on the ground that plaintiffs' claims sounded in ordinary negligence rather than in medical malpractice. Staff Builders also challenges the trial court order denying its additional motion for summary disposition on the ground that plaintiffs' original and first amended complaints should not be voided, even though they were filed after Staff Builders had filed for bankruptcy and an automatic stay was in place under 11 USC 362. We affirm.

I. Standards of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). We review de novo whether a plaintiff's claim sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We similarly review de novo whether a particular claim is barred by the applicable period of limitations. *Id*.; *Kuznar v Raksha Corp*, 272 Mich App 130, 134; 724 NW2d 493 (2006). Finally, issues of statutory interpretation, like all other questions of law, are also reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

II. Bankruptcy Stay

Defendant first argues that the original and first amended complaints were void and effectively nonexistent because they were filed when the automatic stay was in effect. We disagree. "[T]he filing of a [bankruptcy] petition 'operates as a stay, applicable to all entities, of the commencement or continuation [of an action] or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . .'" *Lopez v Lopez*, 191 Mich App 427, 428; 478 NW2d 706 (1991), quoting 11 USC 362. "The purpose of the automatic stay provision is to protect both debtors and creditors. Debtors are insulated from further collection efforts, harassment, and foreclosure actions while formulating a repayment plan. Creditors are ensured orderly liquidation proceedings and equality of treatment." *Lopez, supra* at 428.

However, Michigan courts view stay violations as voidable rather than as absolutely void. *Id.* at 429. Indeed, 11 USC 362(d) gives the bankruptcy court the power to grant relief from an automatic stay "by terminating, annulling, modifying, or conditioning" the stay, and "[b]ankruptcy courts have the jurisdiction to modify the automatic stay so as to allow actions against the debtor." *Easley v Pettibone Michigan Corp*, 990 F2d 905, 909-910 (CA 6, 1993). Section 362(d) expressly authorizes the bankruptcy court to annul the stay, which in turn permits the court to retroactively ratify an action that would have been voided by the stay. See *Davies v CIR*, 68 F3d 1129, 1130 (CA 9, 1995); see also *In re Schwartz*, 954 F2d 569, 572-573 (CA 9, 1992). According to a noted treatise, "[t]he effect [of the statutory language] is to permit the court to fashion the relief to the particular circumstances of the case." 2 Collier on Bankruptcy (15th ed), § 362.07[1], p 362-84.17.

Here, the trial court correctly concluded that the bankruptcy court's stipulated order, providing that the automatic stay was "modified . . . to permit plaintiffs to proceed in the action pending in the circuit court," allowed plaintiffs to proceed against defendants in this action. Accordingly, we reject Staff Builders's argument that plaintiffs' claims were void when filed.

III. The Nature of Plaintiffs' Claims

Staff Builders next argues that the trial court erred in concluding that plaintiffs' claims sounded in ordinary negligence. In any purported medical malpractice action, it must first be determined whether the claims are brought against a licensed entity or individual that is capable of committing medical malpractice. *Bryant*, *supra* at 420. We must then examine "whether the claim pertains to an action that occurred within the course of a professional relationship[.]" *Id.* at 422.

MCL 600.5838a(1) enumerates the entities and individuals that are subject to medical malpractice actions, and provides in relevant part:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code . . . being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.
>
> (b) "Licensed health care professional" means an individual licensed or registered under article 15 of the public health code . . . being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity.

Under § 5838a(1), an entity that is not a "licensed health facility or agency" is nevertheless capable of medical malpractice if the claim is based on the negligence of a "licensed health care professional" that is under the entity's employ. *Kuznar*, *supra* at 136. However, an entity is incapable of medical malpractice if the claim does not involve either a "licensed health facility or agency" or "licensed health care professional." *Id.* at 136-137. If a specific defendant is incapable of committing medical malpractice under § 5838a(1), there can necessarily be no professional relationship between that defendant and the plaintiff. *Id*. at 137. Accordingly, the inquiry ends, and the claim sounds in ordinary negligence only. *Id*. "The absence of a professional relationship alone excludes [a] plaintiff['s] claims from the realm of medical malpractice." *Id*.

In contrast, if it is determined that an entity *is* capable of committing medical malpractice, and that a professional relationship exists between that entity and the plaintiff, it is then necessary to determine whether the plaintiff's claim raises questions of medical judgment beyond the realm of common knowledge and experience. *Bryant*, *supra* at 423. If this inquiry is answered in the affirmative, the action is grounded in medical malpractice and is subject to the procedural and substantive requirements that govern medical malpractice actions. *Id.* As the *Bryant* Court explained:

> After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of

> the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Id.*]

In the present case, after thoroughly reviewing plaintiffs' first amended complaint and hearing the parties' oral arguments before this Court, it has become clear to us that plaintiffs attempted to bring three distinct types of claims against Staff Builders: (1) vicarious-liability claims predicated on the alleged negligence of Staff Builders's nurse employees, (2) vicarious-liability claims predicated on the alleged negligence of Staff Builders's nurse's aide or *non*-nurse employees, and (3) claims asserted directly against Staff Builders for the allegedly negligent training, supervision, retention, and selection of staff members. Plaintiffs' first amended complaint effectively combines all three of these types of claims into several subparagraphs of the same general allegation, never precisely distinguishing between vicarious-liability claims and direct-liability claims, and never differentiating between Staff Builders's nurse and *non*-nurse employees. However, notwithstanding plaintiffs' inartfulness in articulating the precise legal and factual bases for their claims, we find that the pleadings were sufficient to put Staff Builders on notice concerning the three separate and distinct classes of claims against which it was required to defend. See *Mollett v City of Taylor*, 197 Mich App 328, 344; 494 NW2d 832 (1992). It is axiomatic that we will look beyond plaintiffs' mere labels to determine the true gravamen of the claims alleged in the pleadings. *Kuznar*, *supra* at 134; see also *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005); *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 159; 677 NW2d 874 (2003).

A. Direct-Liability Claims Against Staff Builders

Plaintiffs' first amended complaint alleged certain claims directly against Staff Builders as an entity, alleging that Staff Builders had been negligent in its training, supervision, selection, and retention of staff. In contrast to the vicarious-liability claims set forth by plaintiffs, see *infra*, these direct-liability claims were not dependent on the alleged negligence of any particular employee or agent of Staff Builders.

An institutional defendant may be held either (1) directly liable through claims of negligent supervision, selection, and retention of staff, or (2) vicariously liable for the alleged negligence of its agents and employees. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002). Assuming that the institutional defendant is a "[l]icensed health facility or agency" under MCL 600.5838a(1)(a), and therefore capable of independently committing medical malpractice, direct-liability claims for negligent training, supervision, selection, and retention of medical staff will sound in medical malpractice. See, e.g., *Bryant*, *supra*. If, however, the institutional defendant is not a "[l]icensed health facility or agency" under MCL 600.5838a(1)(a), and is therefore incapable of independently committing medical malpractice, direct-liability claims for negligent training, supervision, selection, and retention of staff must necessarily sound in ordinary negligence. See *Kuznar*, *supra* at 137.

As noted above, a "[l]icensed health facility or agency" is "a health facility or agency licensed under article 17 of the public health code . . . being sections 333.20101 to 333.22260 of the Michigan Compiled Laws." MCL 600.5838a(1)(a). Staff Builders is a home care agency. A

home care agency is not listed as a "health care facility or agency" in MCL 333.20106, nor does the remainder of article 17 of the public health code contain any certification or licensing requirements for home care agencies. Accordingly, Staff Builders is by itself incapable of committing independent acts of medical malpractice because it is not a "[l]icensed health facility or agency" within the meaning of MCL 600.5838a(1)(a).

Because Staff Builders is incapable of independent acts of medical malpractice, plaintiffs' direct-liability claims against Staff Builders for negligent training, supervision, selection, and retention of staff necessarily sound in ordinary negligence only. See *Kuznar*, *supra* at 137. Plaintiffs' direct-liability claims against Staff Builders were all contained in the original complaint of January 2003, filed well within the three-year period of limitations for actions alleging ordinary negligence. MCL 600.5805(10); *Kuznar*, *supra* at 133. Plaintiffs' direct-liability claims alleging negligent training, supervision, retention, and selection of staff may therefore proceed on remand as timely filed.

B. Vicarious-Liability Claims Predicated on Negligence of Nurse Employees

Plaintiffs also asserted certain vicarious-liability claims against Staff Builders, which were predicated on the alleged negligence of Staff Builders's nurse employees. As noted above, Staff Builders is a home care agency, which is not itself capable of independent acts of medical malpractice. MCL 600.5838a(1). However, even though Staff Builders is not a "[l]icensed health facility or agency," certain of its employees are "[l]icensed health care professional[s]" as defined by § 5838a(1)(b). Under § 5838a(1), an entity that is not a "licensed health facility or agency" may nevertheless be held vicariously liable in medical malpractice for the professional negligence of a "licensed health care professional" under the entity's employ. *Kuznar*, *supra* at 136.

Licensed practical nurses and registered nurses are subject to the certification and licensure requirements of article 15 of the public health code. MCL 333.17208; MCL 333.17210; MCL 333.17211; MCL 333.17212. Staff Builders's nurse employees are therefore "[l]icensed health care professional[s]," MCL 600.5838a(1)(b), and were capable of committing medical malpractice within the course of their professional relationship with decedent. As such, even though Staff Builders is not a "[l]icensed health facility or agency," it may be held vicariously liable for the medical malpractice of its nurse employees. *Kuznar*, *supra* at 136.

Moving to the next step of the *Bryant* inquiry, we conclude that plaintiffs' vicarious-liability claims predicated on the alleged negligence of Staff Builders's nurse employees raise "questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, *supra* at 422. The claims concern patient monitoring and the assessment of the risk of positional asphyxiation posed by decedent's bedding and accommodations. These claims are nearly identical to those put forward in *Bryant*, and each claim involves questions of professional medical management rather than questions within the common knowledge and experience of a jury. *Id.* at 426-429; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). Plaintiffs' vicarious-liability claims predicated on the alleged negligence of Staff Builders's nurse employees sound in medical malpractice.

"The period of limitations for a medical malpractice action is ordinarily two years. MCL 600.5805(6)." *Bryant*, *supra* at 432. Decedent died on December 16, 2000, but the original

complaint was filed in January 2003. Additionally, although the personal representatives were appointed in September 2001, the first amended complaint and affidavit of merit were not filed until March 2004, more than two years later. See MCL 600.5852; *Waltz v Wyse*, 469 Mich 642, 646; 677 NW2d 813 (2004). Finally, while plaintiffs filed their notice of intent in August 2003, it is settled that filing of a notice of intent does not toll the two-year medical malpractice saving period provided by MCL 600.5852. *Id.* at 649-650. Accordingly, under typical circumstances, plaintiffs' vicarious-liability medical malpractice claims, predicated on the alleged negligence of Staff Builders's nurse employees, would be time-barred. *Bryant*, *supra* at 432.

However, the instant medical malpractice claims, based on the alleged negligence of Staff Builders's nurse employees, may nonetheless proceed to trial on remand in this case. As our Supreme Court explained in *Bryant*:

> [The p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. [*Id.*]

As noted, plaintiffs' vicarious-liability medical malpractice claims are remarkably similar to those raised in *Bryant*. The present case was originally filed in January 2003, well over a year before our Supreme Court's decision in *Bryant*. Moreover, even plaintiffs' first amended complaint was filed before the *Bryant* opinion was decided. Taking into account the timing and specific facts of this case, we conclude that plaintiffs' vicarious-liability medical malpractice claims, predicated on the alleged negligence of Staff Builders's nurse employees, may proceed to trial on remand alongside plaintiffs' ordinary negligence claims. *Id.*

C. Vicarious Liability Claims Predicated on Negligence of *Non*-Nurse Employees

Lastly, plaintiffs asserted certain vicarious-liability claims against Staff Builders that were predicated on the alleged negligence of *non*-nurse employees. These claims were identical in substance to the vicarious-liability claims predicated on the nurse employees' alleged negligence. However, unlike plaintiffs' vicarious-liability claims predicated on alleged nurse negligence, the claims predicated on alleged *non*-nurse negligence sound in ordinary negligence alone.

Plaintiffs' vicarious-liability claims were not only predicated on the alleged wrongs of Staff Builders's nurses, but also on the alleged wrongs of at least one *non*-nurse employee, apparently either a nurse's aide or a nursing assistant. As noted, nurses are licensed and regulated under article 15 of the public health code. MCL 333.17208; MCL 333.17210; MCL 333.17211; MCL 333.17212. In contrast, nursing aides and assistants are not licensed or regulated under article 15 of the public health code. Therefore, a nurse's aide or a nursing assistant is not a "[l]icensed health care professional" within the meaning of MCL 600.5838a(1)(b), and is incapable of committing medical malpractice within the course of a professional relationship. MCL 600.5838a(1).

As discussed above, although Staff Builders is not a "[l]icensed health facility or agency," MCL 600.5838a(1)(a), Staff Builders may be held vicariously liable in medical malpractice for the alleged negligence of an agent or employee who is a "[l]icensed health care professional," MCL 600.5838a(1). Conversely, Staff Builders *may not* be held vicariously liable in medical malpractice for the alleged negligence of an employee who is *not* a "[l]icensed health care professional." Because nurse's aide and nursing assistant employees are incapable of committing medical malpractice within the course of a professional relationship, and because Staff Builders as an entity is also incapable of committing acts of medical malpractice, plaintiffs' vicarious-liability claims based on the alleged negligence of Staff Builders's *non*-nurse employees cannot sound in medical malpractice. *Kuznar, supra* at 136-137. These claims sound in ordinary negligence only.

Plaintiffs' vicarious-liability claims predicated on the alleged negligence of Staff Builders's *non*-nurse employees were all contained in the original complaint of January 2003, filed well within the three-year period of limitations for actions alleging ordinary negligence. MCL 600.5805(10); *Kuznar, supra* at 133. These vicarious-liability claims predicated on the alleged wrongs of *non*-nurse employees may therefore proceed on remand as timely filed.

IV. Conclusion

We affirm the trial court's determination that the bankruptcy court's stipulated order allowed plaintiffs to proceed with this state court action.

We affirm the trial court's denial of summary disposition with respect to plaintiffs' direct-liability claims against Staff Builders for negligent training, supervision, selection, and retention of staff. Similarly, we affirm the trial court's denial of summary disposition with respect to plaintiffs' vicarious-liability claims predicated on the alleged negligence of Staff Builders's *non*-nurse employees. These claims sound in ordinary negligence only, and therefore may proceed to trial on remand.

We also affirm the trial court's denial of summary disposition with respect to plaintiffs' vicarious-liability claims predicated on the alleged negligence of Staff Builders's nurse employees. Although these claims sound in medical malpractice, they may proceed to trial on remand alongside plaintiffs' ordinary negligence claims.[1]

[1] The trial court did not decide the issues of duty or breach, and we therefore decline to address these matters on appeal. Indeed, we express no opinion concerning whether Staff Builders and its employees owed legally recognized duties to decedent. However, we cannot omit mention that in order to sustain their ordinary negligence claims on remand, plaintiffs must show the existence of an applicable duty and a breach of that duty. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Similarly, to sustain their medical malpractice claims on remand, plaintiffs must show the existence of an applicable standard of care and that Staff Builders's nurse employees breached that standard. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra